IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1724

THE STATE OF NEW YORK,

Petitioner,

—v.—

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Motion for leave to file brief Amici Curiae and

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The American Civil Liberties Union (ACLU) and the New York Civil Liberties Union (NYCLU) move for leave to file the attached brief as amici curiae. The petitioner has refused to consent to the filing of this brief.

The ACLU is a nationwide, non-profit, non-partisan organization of over 250,000 members dedicated to defending the principles embodied in the Bill of Rights. The NYCLU is one of its statewide affiliates.

This case raises important issues of longstanding concern to both the ACLU and the NYLCU. First, it involves a loitering statute that is so vague in its proscriptions and so overbroad in its reach that it

inevitably intrudes on First Amendment freedoms. On many occasions, amici have participated in similar challenges to such loitering statutes before this Court.

In addition, the facts and circumstances of respondent Uplinger's arrest highlight the manner in which this particular loitering statute has been utilized in a discriminatory manner against homosexuals in New York. Amici have long opposed discrimination against homosexuals in any form, including statutes like this one that make it a crime to discuss private sexual activity with another consenting adult in a discreet manner.

For both of these reasons, the NYCLU submitted an amicus brief to the New York Court of Appeals in support of respondents. Our interest in this Court remains the same. To present their views in this important First Amendment case, the ACLU and

NYCLU respectfully move for leave to file the attached brief as amici curiae.

Respectfully submitted,

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INTEREST OF AMICI

The interest of amici curiae is set forth in the motion attached to this brief.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the statement of facts contained in respondents' briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

In overturning respondents' convictions below, the New York Court of Appeals characterized the loitering law at issue here as a "companion statute," 58 N.Y.2d 937, 938 (1983), to the consensual sodomy law struck down three years before on privacy grounds in People v. Onofre, 51 N.Y.2d 476 (1980), cert. denied, 451 U.S. 987 (1981). Because of that reference, this case has been treated by some as an opportunity to address the underlying question raised by Onofre and never resolved

by this Court.

The question of whether homosexuals in America are entitled to constitutional protection in their private sexual affairs is undoubtedly a significant one. For nearly two decades, however, this Court has steadfastly upheld the right of individual autonomy in private sexual matters. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 478 (1972). Should this Court feel compelled to reach the privacy issue here, the principles enunciated in this Court's prior decisions require affirmance of the decision below. Indeed, if anything, the stigma still attached to being a homosexual in this country only magnifies the need for constitutional protection against official persecution. See generally, Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L.J. 799 (1979). Cf.

NAACP v Alabama, 357 U.S. 449 (1958). Moreover, it is clear that the state may not frustrate the exercise of fundamental rights by denying access to the means or individuals necessary to implement those rights. Bigelow v. Virginia, 421 U.S. 809 (1975).

While supporting a broad view of the constitutional right of privacy, amici nevertheless believe that the privacy issue need not be reached in this case. Under traditional First Amendment analysis, the loitering statute now before this Court cannot be sustained.

This Court, of course, has often reviewed the constitutionality of loitering statutes and has repeatedly noted the chilling effect of vaguely worded laws on First Amendment rights. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1971). In this case, New York has purported to penalize loitering in a public place "for

the purpose of . . . soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." New York Penal Law §240.35(3). The state, however, has failed to define the critical element of solicitation and, more particularly, has failed to include in the statute any requirement of an overt act. Accordingly, the statute is prone to the vagaries of arbritary enforcement that this Court has often condemned. In addition, it lacks the requisite notice that due process demands of a criminal law. Not surprisingly, therefore, two state courts have struck down virtually identical statutes on vagueness grounds. People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974); Gates v. Municipal Court of Santa Clara County, 135 Cal.App.3d 309, 185 Cal.Rptr. 330 (1982). The New York law is thus unconstitutional on its face.

It is also unconstitutional as applied in the context of this case. At the time respondents were arrested, Onofre had already invalidated New York's consensual sodomy law. There is no evidence in the record that either respondent was guilty of annoying or harassing behavior; indeed, neither respondent was even charged with harassment. Rather, respondents were arrested for inviting another to engage in conduct that New York's highest court had declared to be constitutionally protected. Under the circumstances, respondents' speech was entitled to the plenary protection of the First Amendment. None of the asserted justifications offered by the state are sufficient to override respondents' First Amendment rights.

ARGUMENT

I. NEW YORK'S LOITERING STATUTE IS UNCONSTITUTIONALLY VAGUE

This Court has often stressed the importance of specificity in loitering and vagrancy laws. See Kolender v. Lawson, 103 S.Ct. 1855 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1971); Coates v. Cincinnati, 402 U.S. 611 (1971); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965). Because the loitering statute at issue in this case lacks the specificity required by this Court's prior decisions, it is facially invalid and must be struck down.[1]

1. Even assuming, arguendo, that the solicitations in this case could be validly proscribed under a clearly and narrowly drawn prohibition of sexual solicitations, respondents may nevertheless challenge the facial constitutionality of §240.35(3) on vagueness grounds. This Court has recently reaffirmed the principle that vagueness challenges will be permitted where a criminal statute reaches a substantial amount of constitutionally protected conduct, particularly when First Amendment liberties are implicated. See Kolender v. Lawson, 103 S.Ct. 1855 at 1859 n.8; see also Hoffman
(Footnote cont'd.)

Respondents were arrested for having "loitered in a public place" with an allegedly evil intent -- the intent of soliciting another person to engage in "deviate sexual intercourse or other sexual behavior of a deviate nature." The concept of "solicitation" is thus at the heart of the statute. Nowhere in the statute, however, is the term "solicitation" defined. This central ambiguity alone renders the statute unconstitutionally vague.

It can hardly be claimed that the term "solicitation" is self-defining. Depending upon circumstances and the idiosyncratic understanding of the individuals involved, a wide range of comments and behavior could easily be regarded as an impermissible solicitation, including a friendly smile, a wink, a suggestive glance or an invitation

(Footnote cont'd.)
Estates v. Flipside, 455 U.S. 489, 495 n.7 (1982).

back to one's apartment without express reference to sex. Since any homosexual act might be considered "sexual behavior of a deviate nature," any gesture or remark to an individual of the same sex that might be construed in a criminal trial as referring to sex is theoretically proscribed.

"[A] statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ so as to its application violates the first essential of due process." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). Moreover, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). This is especially true where a statute "abut[s] upon sensitive areas of basic First Amendment freedoms,"

Baggett v. Bullitt, 377 U.S. 360, 372 (1964), and, as in the case of respondent Uplinger, permits an arrest to be triggered by the specific words spoken.

The failure to define the term "solicitation" creates the most significant ambiguity in the law, but not the only one. In addition, the law fails to define the "public" places in which "solicitations" are proscribed. The state suggests in its brief that the reach of the statute is limited to publicly-owned property. Petitioner's Brief at 16, 21, 23. But the predecessor to §240.35(3) was applied even to activity in a homosexual bar. See People v. Pleasant, 23 Misc.2d 367, 122 N.Y.S.2d 141 (City Ct. N.Y.C. 1953). Thus, a person seeking "to steer between lawful and unlawful conduct," Grayned v. City of Rockford, 408 U.S. at 108, is at a loss to know what he may say without engaging in "solicitation" and where he may

say it without violating the law.

Similarly, there is no indication in the statute of what constitutes "other sexual behavior of a deviate nature." Recognizing this infirmity, the state defines the phrase in its brief as embracing conduct which is "sexual[ly] abnormal" or "given to significant departures from the behavioral norms of society." Petitioner's Brief at 11, 30. These definitions, even assuming they are consistent with what the Legislature had in mind, only compound the vagueness problem. To interpret the statute, one "must gauge the temper of the community, and predict at his peril the moral and sexual attitudes of those who will be called to serve on the jury." Pryor v. Municipal Court for Los Angeles, 25 Cal.3d 238, 252, 599 P.2d 636, 644 (1979) (invalidating law prohibiting solicitation of lewd or dissolute acts). See also Jellum v. Cupp, 475 F.2d 829 (9th Cir.

1973).

The unconstitutional vagueness of New York's loitering statute is plainly illustrated by comparing it to analogous provisions in the loitering and solicitation statutes of other states. In contrast to New York's approach of prohibiting loitering for an unlawful purpose, the majority of similar state statutes require an overt act to establish solicitation.[2] Significantly, the

2. See, e.g., Ariz. Rev. Stat. Ann. §13-2905(A)(1) (1978); Ga. Code Ann. §16-6-15(1982); Md. Code Ann. art. 27, §15(e) (1982); Mich. Stat. Ann §750.448(1968); Miss. Code §97-35-3(b)(1972); Nev. Rev. Stat. §207.030(a)(1981); N.D. Cent. Code §12.1-31-01(6)(1976); Ohio Rev. Code Ann. §2907.07(B)(1982); Okla. Stat. tit. 21, §1029(b)(1982); Or. Rev. Stat. §163.455(1971); Wisc. Stat. Ann. §947-02(3)(1982). See also D.C. Code Ann. §22-1112(a)(1981). Only five states have statutes that, like New York's, require no overt act of any kind. See Ala. Code §13A-11-9(1982); Ark. Crim. Code §41-2914(1)(e)(1977); Del. Code Ann. tit. 11, §1321(5)(1979); Kan. Stat. Ann. §21-4108(d)(1981); S.C. Code §16-15-90(5)(1976). See also Colo. Rev. Stat. §18-9-112, invalidated on account of its failure to require an overt act in People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974).

predecessor to New York's loitering statute required an act of solicitation as an element of the loitering offense.[3] There is no explanantion in the legislative history for why that requirement was subsequently deleted.

Obviously, if the loitering statute once contained an overt act requirement, "further precision in the statutory language is "[n]either impossible nor impractical." Kolender v. Lawson, 103 S.Ct. at 1860. New York's statutory prohibition against loitering for the purpose of engaging in prostitution, for example, offers specific illustrations of the conduct it proscribes. See New York Penal Law §240.37(2). Thus, the repeated "beckoning" of persons or cars creates an inference of loitering for the

3. See former New York Penal Code, §722(8). The statute is cited in People v Burnes, 178 N.Y.S.2d 746, 749 (N.Y.C. App. 1958).

purpose of prostitution under the statute. Id. Whether that inference is justified or not is less important for present purposes than the fact that it is clearly spelled out in the language of the law. Such objective standards are totally absent from the loitering statute at issue in this case.

The question of whether a loitering statute, like New York's, can be upheld without the requirement of an overt act has been addressed by only two other courts, and both courts have struck down similar laws as unconstitutional. In People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974), the Colorado Supreme Court held that its state's loitering statute violated due process requirements. Like this case, Gibson involved a challenge to a statute prohibiting loitering "for the purpose of engaging or soliciting another person to engage in . . . deviate sexual intercourse." Colo. Rev. Stat. §18-9-

112(2)(c). The court held that the legislature's failure to require any overt conduct in addition to the loitering rendered the statute unconstitutional. Like the court below, the Colorado Supreme Court declined to read an overt act requirement into the statute in order to save it from constitutional invalidity.

The Gibson court articulated two reasons for its refusal to impose an overt act requirement on Colorado's loitering statute: a reluctance to usurp the legislative function, and a desire to avoid the inconsistency of prohibiting loitering for the purpose of engaging in conduct that was legally protected in Colorado, as in New York. 184 Colo. at 446-47. The approach of the court below is fully consistent with each of these rationales.[4] Indeed, imputing an

4. Although the Erie County Court interpreted §240.35(3) to require "an overt act or other conduct unambiguously evidencing
(Footnote cont'd.)

overt act requirement in the instant case would have been at odds with the apparent legislative intent underlying the present wording of the statute. Since §240.35(3) was drafted to eliminate the overt solicitation requirement of its predecessor, the New York Court of Appeals would have effectively repealed this legislative revision had it imposed the requirement of an overt act by judicial interpretation. As the Court of Appeals also recognized, however, §240.35(3) is unconstitutional in its present version.

Likewise, in Gates v. Municipal Court of Santa Clara County, 135 Cal.App.3d 309, 185 Cal.Rptr. 330 (1982), the court concluded

(Footnote cont'd.)
the proscribed purpose," People v. Uplinger, 113 Misc. 2d 876, 880, 449 N.Y.S.2d 916, 920-21, (Erie Cty. Ct. 1983), this interpretation was not adopted by the New York Court of Appeals in its reversal of the Erie County Court's decision. This Court is, of course, bound by the construction of the statute adopted by the New York Court of Appeals. Mullaney v. Wilbur, 421 U.S. 684 (1975).

that an ordinance prohibiting loitering "for the purpose of soliciting an act of prostitution or lewdness, if such person is a known panderer or prostitute" was unconstitutionally vague. The court emphasized that other than the single reference to status, itself problematic, the ordinance afforded complete discretion to law enforcement officials "whose subjective judgment alone would determine whether sufficient 'intent' accompanies the act of 'loitering' or 'remaining' in a public place." 135 Cal.App.3d at 320. Under well-settled doctrine, the court then decided that this virtual absence of any objective standard to guide law enforcement rendered the ordinance impermissibly vague. Id.

The absence of specifically defined conduct as an element of New York's loitering statute creates precisely the same problem and, for the same reasons, makes arbitrary

enforcement of §240.35(3) almost inevitable. Determining when a person loiters with a particular purpose is an exercise in psychological guesswork. Because of the statute's lack of any objective and clearly defined standards, those charged with its enforcement are left to apply the law based on their individual predilections and subjective determinations. This absence of clear and specific standards is even more problematic in view of the discreet, ambiguous nature of the typical homosexual solicitation.[5] New York's complete reliance

5. See e.g., Bell, Public Manifestations of Personal Morality: Limitations on the Use of Solicitation Statutes to Control Homosexual Cruising, in Homosexuality and the Law, at 107 (D. Knutsen ed. 1980) (homosexual solicitation is typically cautious, unobtrusive and equivocal); Note, There May Be Harm in Asking: Homosexual Solicitations and the Fighting Words Doctrine, 30 Case W. Res. L. Rev. 461, 490 (1979) (homosexual solicitation is clandestine, discreet and circumspect); see generally Project, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County, 13 U.C.L.A. L. Rev. 643, 698-99 nn.81-84 (1966).

on the discretion of law enforcement officials in applying the statute is precisely what the vagueness doctrine forbids. See Kolender v. Lawson, 103 S.Ct. at 1860; Papachristou v. City of Jacksonville, 405 U.S. at 170.

Furthermore, the broad and ambiguous proscriptions of §240.35(3) risk suppressing a substantial degree of legitimate expression. Because the statute fails to specify what types of verbal expression or nonverbal behavior are prohibited, it is susceptible to applications far beyond its legitimate or intended scope. Solicitations of non-deviate, non-commercial sexual activity, although beyond the literal scope of the statute, are surely inhibited by the statute's ambiguous provisions. Solicitations of a completely non-sexual nature -- invitations to one's home,

invitations to go out to dinner, to a bar, or to any other social occasion -- are also forms of expression that may be prohibited if it is later determined by some finder of fact that such expressions evince the statute's forbidden purpose. Even conversations bereft of any invitation are subject to criminalization under the statute if a police officer reads a forbidden intent into what might otherwise be an innocuous discussion.

The statute's inherently ambiguous provisions also pose the risk of infringing rights of association and assembly. This Court simply cannot ignore the fact that this statute is most often applied against homosexuals. As in Coates v. Cincinnati, 402 U.S. 611, 616 (1971), the broad language of §240.35(3) unfortunately invites discriminatory enforcement against a class of individuals whose association together may be deemed annoying for no other reason than that

"their ideas, their lifestyle, or their physical appearance is resented by a majority of their fellow citizens." Given that potential of discriminatory enforcement against a disfavored group, the necessity of precision in the statutory language is even more paramount.

In failing to predicate enforcement of §240.35(3) on clearly defined acts that can be objectively determined both by those applying the statute and those within its reach, New York has "violate[d] the first essential of due process." Connally v. General Construction Co., 269 U.S. at 391. Its loitering statute must therefore be struck down, on its face, as unconstitutionally vague.[6]

6. Assuming the statute is held to be unconstitutional on its face, the convictions of both respondents Uplinger and Butler must be reversed.

II. NEW YORK'S LOITERING STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE

Since 1980, the law of New York has afforded constitutional protection to the private consensual acts solicited by respondents in this case. People v. Onofre, 51 N.Y.2d. 476, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981). Regardless of whether the conclusion in Onofre is held by this Court to constitute a correct exposition of federal law at some futute date, it was in fact the controlling law in New York at the time of respondent's arrest and conviction. Thus §240.35(3) must be construed in the instant case solely as a prohibition of loitering for the purpose of soliciting others to engage in legal conduct. Indeed, even petititoner characterizes respondent Uplinger's speech as a solicitation to engage in constitutionally protected activity. Petitioner's Brief at 2, 12.

Respondents' solicitation is therefore entitled to protection under the First Amendment and can only be overridden by a compelling state interest. See Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976). None of the interests asserted by petitioner is sufficient to satisfy that constitutional test. Accordingly, the application of §240.35(3) to the facts of this case can not be sustained regardless of whether or not the statue is facially valid.

Over the past forty years, this Court has repeatedly struck down efforts by the State to prohibit one individual from soliciting another to engage in constitutionally protected activity. See Thomas v. Collins, 323 U.S. 516 (1945); Martin v. Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296

(1940). Moreover, the governmental interests most often asserted in those cases without success are precisely the same interests asserted by petitioner here: privacy, a generalized fear of harassment, and an ill-defined sense that the solicitations involved would be offensive to many in the community.

Reflecting that tradition, courts around the country in recent years have consistently invalidated statutes like §240.35(3) that criminalize solicitation to engage in lawful conduct under the rubric of a loitering law. See State v. Tusek, 52 Or. App. 997, 630 P.2d 892 (1981); City of Columbus v. Scott, 47 Ohio App.2d 287, 385 N.E.2d 858 (1975). See also People v. Gibson, supra (recognizing inconsistency of prohibiting solicitation of non-criminal sexual activity); Cherry v. State, 18 Md.App. 252, 306 A.2d 634 (1973) (noting with approval cases holding that solicitation to commit

legal sexual act is protected speech). Other courts have avoided the constitutional dilemma by narrowly interpreting their loitering laws to prohibit only the solicitation of criminal conduct. See Commonwealth v. Sefranka, 382 Mass. 108, 414 N.E.2d 602 (1980); Pryor v. Municipal Court for Los Angeles, supra; Pederson v. City of Richmond, 219 Va. 1061, 254 S.E.2d 95 (1979) (noting that "it would be illogical and untenable to make solicitation of a non-criminal act a criminal offense"). All of these cases represent a steadfast refusal to permit legislative proscription of forms of expression whose object is to engage in legally protected conduct.

In order validly to prohibit forms of expression protected by the First Amendment, petitioner must demonstrate legitimate and compelling governmental objectives which are furthered by a narrowly tailored statutory

proscription. See Shelton v. Tucker 364 U.S. 479 (1960). Petitioner has expressly refused to assert an interest in prohibiting consensual sodomy as a basis for upholding New York's loitering statute. See Petitioner's Brief at 2, 12. Instead, four justifications have been offered by petitioner in support of its abridgement of respondents' protected speech. According to petitioner, §240.35(3) is a harassment statute which seeks to prohibit offensive and annoying behavior; it is designed to prevent an affront to moral and esthetic sensibilities and preserve the residential character of neighborhoods; it seeks to protect against harm to minors; and it seeks to protect the privacy interests of citizens in public places. See id. at 15-22. None of these justifications can withstand constitutional scrutiny.

First, New York's loitering statute is

neither limited nor designed to prohibit offensive or annoying behavior and thus cannot be characterized as a harassment statute. The statute on its face and as authoritatively construed contains no requirement of offense or annoyance; rather, other statutes have been designed specifically for the purpose of prohibiting offensive or annoying conduct. See N.Y. Penal Law §240.20 (McKinney 1980) (prohibiting disorderly conduct), §240.25 (prohibiting harassment). In fact, the New York Court of Appeals specifically refused in this case to categorize §240.35(3) as a harassment statute. 58 N.Y.2d at 938. Cf. Pryor v. Municipal Court of Los Angeles, 25 Cal.3d at 256 (interpreting solicitation statute to require offensiveness). This refusal to narrow the scope of §240.35(3) is consistent with the legislative history of the statute, which demonstrates a desire not

to punish offensive or annoying speech, but rather to proscribe "unsalutary or unwholesome" forms of expression. See Report of the New York State Comission on Revision of the Penal Law and Criminal Code, 1964 Leg. Doc., 187th Sess., No. 14 (hereinafter Legislative Report). In short, whether or not New York may validly prohibit forms of expression which are annoying or offensive to others, the language, legislative history and judicial interpretation of New York's loitering statute convincingly demonstrate that §240.35(3) is simply not such a prohibition.

Furthermore, application of such a statutory requirement would be inappropriate in the instant case. There is no evidence that respondent Uplinger's solicitation was either offensive or annoying to anyone. Rather, the record demonstrates that his solicitation was discreet and unobtrusive,

delivered late at night with no passerby in the vicinity. The solicitation was made only after respondent had quite reasonably concluded that it would be favorably received by Officer Nicosia, who was present for the very purpose of being solicited. At no time did respondent make any physical contact or other threatening remarks or gestures; nor was his behavior unruly, oppressive or intimidating in any way. Given these circumstances, respondent's solicitation simply cannot be described as offensive or annoying.

Second, the sexual nature of respondent Uplinger's speech does not alter the invalidity of its prohibition. Several courts have held that sexual solicitations are constitutionally protected from prohibition in spite of their allegedly unpopular, distasteful or provocative nature. See State v. Tusek, 52 Or. App. at

1001-03; Pryor v. Municipal Court for Los Angeles 25 Cal.3d at 252 n.7.[7] Respondent's solicitation, discreetly delivered in a cautious and unobtrusive manner, is similarly entitled to constitutional protection.

Petitioner's argument that decisions by this Court compel a countrary conclusion mischaracterizes this Court's rulings. Only in narrowly circumscribed circumstances has this Court indicated that sexually explicit forms of expression are subject to a limited degree of regulation. See F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976); California v. LaRue, 409 U.S. 109 (1972). This Court has never condoned the

7. Commonwealth v. Sefranka, supra, Pederson v. City of Richmond, supra, and District of Columbia v. Garcia, 335 A.2d 217 (D.C. App.), cert. denied, 423 U.S.894 (1975), are not to the contrary. In each of these decisions, the court interpreted the relevant state statute to prohibit only solicitations to engage in illegal conduct. The Uplinger court did not similarly construe §240.35(3).

broad criminal prohibition of sexually-oriented or provocative expression which inheres in New York's loitering statute. To the contrary, this Court has consistently struck down state laws that attempt to prohibit, rather than regulate, such speech in seeking to protect the sensibilites of citizens who may be offended by its content. See Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California; 403 U.S. 15 (1971). See also Papish v. Board of Curators of University of Mississippi, 410 U.S. 667 (1973).

In contrast to narrowly drawn civil regulations which seek to control only when and where in the marketplace of ideas sexually-oriented speech can be expressed, see FCC v. Pacifica Foundation, supra (time regulation of radio broadcast); Young v.

American Mini-Theatres, Inc., supra (requiring dispersal of adult movie theatres), New York's criminal prohibition of such expression effectively stifles all forms of sexual solicitation.[8] This far-reaching suppression of even sexually-oriented speech is flatly inconsistent with the First Amendment principles recently enunciated by

8. The New York loitering statute cannot properly be characterized or upheld as a reasonable restriction on the time, place or manner of speech. First, the term "public place" has been expansively interpreted to include not only streets and parks, but also practically every area where social interaction is possible, including semipublic buildings or areas, common areas of private buildings, and a bar. See People v. Nowak, 46 A.D.2d 469, 363 N.Y.S.2d 142 (1975); People v. Pleasant, 23 Misc. 2d 367, 122 N.Y.S.2d 141 (City Ct. N.Y.C. 1953). It is thus disingenuous to characterize §240.35(3) as merely a restriction on the "place" where sexual solicitations may occur. Second, restrictions on the time, place or manner of expression must be unrelated to the suppression of particular speech. See Grayned v. City of Rockford, 408 U.S. at 115, 120. Section 240.35(3) does not purport to accomplish anything but this impermissible goal -- it seeks to prohibit only solicitations of a particular nature.

this Court; even where sexually explicit visual depictions are involved, governmental measures which either suppress or restrict access to speech in a content-biased fashion are constitutionally intolerable. See Young v. American Mini-Theatres, Inc. 427 U.S. at 71 n.35; id at 78-79 (Powell, J., concurring).

The use of the criminal sanction to punish provocative or unpopular speech in traditional public fora also exceeds constitutional limits on the state's power to restrict First Amendment rights. No precedent from this Court supports prohibition of protected communication on the public streets and sidewalks, especially on the ground that the speech is "unsalutary or unwholesome."[9] See Cantwell v. Connecticut, 310 U.S. 296 (1940); Hague v. C.I.O., 307 U.S. 496 (1939). In seeking to protect the

9. See Legislative Report at 27.

sensibilities of citizens and preserve community standards, New York's criminal proscription of sexual soliciting far exceeds even the broadest permissible scope of governmental regulation of sexually explicit speech.

Third, the state's interest in the welfare of minors in no way supports the constitutionality of §240.35(3). The statute was not designed to eliminate any perceived harmful effects of loitering on minors. Cf. N.Y. Penal Law §263.15 (McKinney 1980). Moreover, petitioner has failed to produce any evidence that loitering or sexual solicitation in fact produces the palpable harm -- sexual exploitation of children -- which this Court has deemed sufficient to support the suppression of sexually explicit visual material. See New York v. Ferber, 102 S.Ct. 3348 (1982). In the absence of such harm, the statute is little more than an

impermissible attempt to use a criminal prohibition to reduce the level of public discourse to that which is suitable for children. See Erznoznik v. City of Jacksonville, 422 U.S. at 212-14; Butler v. Michigan, 352 U.S. 380 (1957). And although a narrowly drawn civil regulation of sexually explicit speech may be employed in certain circumstances to protect the interests of minors, see FCC v. Pacifica Foundation, supra, this Court's First Amendment doctrine would in no way permit a criminal conviction of George Carlin for delivering his provocative monologue on a public street. Respondents' speech, delivered late at night with no minors in the vicinity, is similarly beyond the scope of the state's power to punish.

Fourth, the application of §240.35(3) against discreet solicitations in public places cannot be upheld by merely reciting

the privacy interests of passersby. "The plain, if at times disquieting truth is that in our pluralistic society, we are inescapably captive audiences for many purposes" and invariably exposed to messages that offend our "esthetic, if not political and moral, sensibilities." Erznoznik v. City of Jacksonville, 425 U.S. at 210. Moreover, when an unobtrusive and cautiously delivered form of expression occurs in a public place and is readily and easily avoidable, the privacy interests of passersby are de minimus and can be adequately protected by the simple action of averting one's eyes. See Cohen v. California, 403 U.S. 15, 21 (1971). Here respondent Uplinger's late-night solicitation was discreetly delivered to an apparently willing and responsive audience of one. In such circumstances, the privacy interests of citizens who are not present or exposed to the speech in question are patently

insufficient to justify the statute's substantial burdening of First Amendment rights. See State v. Phipps, 58 Ohio St.2d 271, 389 N.E.2d 1128 (1979) (refusing to uphold ban on sexual solicitation as valid protection of citizens' privacy interests).

The prohibition of respondent Uplinger's pursuit of legally permissible conduct also interfered with his freedom of association and assembly. In Coates v. Cincinnati, supra, this Court held that an ordinance prohibiting sidewalk assemblies of three or more persons conducting themselves in a manner annoying to others violated the rights of free assembly and association. The Court concluded that public animosity or intolerance was an insufficient reason for burdening these rights. Id. at 665; see also Kolender v. Lawson, 103 S. Ct. at 1859.

New York's loitering statute, unlike the ordinance struck down in Coates, fails even

to require that the loiterer offend or annoy others. In fact, the legislative history of §240.35(3) clearly negates petitioner's characterization of the statute as an attempt "to control public order." Petitioner's Brief at 14. See Legislative Report at 26 ("sexual loitering offenses...[do not] normally tend[] to provoke public disorder or a breach of the peace"). No interference with citizens' legitimate rights to use the public streets and sidewalks is alleged to have occurred as a result of respondent's associational activity. On the contrary, respondent's only purpose was discreetly and unobtrusively to seek associations with willing and receptive partners for the purpose of engaging in legally permissible conduct. His actual behavior was entirely consistent with this limited purpose.

It is thus apparent from the record that the statute at issue is both designed and

applied primarily to suppress expressions or associations incident to an unpopular lifestyle, see Coates v. Cincinnati, 402 U.S. at 616, rather than to achieve any legitimate and compelling state objectives. See Legislative Report at 27 (loitering statute prohibits forms of behavior and expression "deemed generally unsalutary or unwholesome from a social viewpoint"). That purpose may not constitutionally be pursued through a loitering statute.

Finally, even assuming that the state's interest in prohibiting loitering and sexual solicitation is legitimate and compelling, petitioner cannot pursue these interests through the application of §240.35(3), since the state's objectives can be more narrowly achieved. See N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960). If petitioner seeks to prohibit solicitations which are offensive,

annoying or even obscene, it can easily rely on other statutes which are designed specifically to achieve this goal. See N.Y. Penal Law §§ 240.20, 240.25 (McKinney 1980). The state's interest in protecting minors can be more directly achieved by prohibiting the solicitation of minors to engage in sexual activity. See, e.g., Wash. Rev. Code Ann. §9A.88.020 (1977). The privacy interests of citizens also can be protected by narrower, constitutionally permissible means, i.e., a prohibition of "fighting words," or a prohibition of unusually loud or disruptive solicitations. See, e.g., N.Y. Penal Law §240.20(2),(3). Section 240.35(3), however, is an impermissibly broad means of achieving these governmental objectives. See Speiser v. Randall, 357 U.S. 513, 525 (1958). As applied to the facts of this case, it unconstitutionally abridges respondents'

First Amendment rights and cannot be sustained.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

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